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Supreme Court, U.S.
FILED
JAN 6 1998
CLERK

No. 97-859

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

VERN T. JORDAHL, MARY-BETH LAROCK, and VIRGINIA LEADERSHIP COUNCIL,

Petitioners,

v.

DEMOCRATIC PARTY OF VIRGINIA, RICHMOND CITY DEMOCRATIC COMMITTEE, and COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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I. THE CHANGES TO VIRGINIA'S ELECTION LAWS ARE NOT MATERIAL TO THE ISSUES PETITIONERS HAVE RAISED.

A. Respondents Fail to Identify Any *Material* Changes in the Law.

Virginia argues that Petitioners' prior restraint challenge is moot because of the intervening statutory recodification and amendments, but Virginia does not explain why or how these changes are material. Because the changes are not material to the issues raised in this case, they do not moot Petitioners' challenge.

The Democratic Party identifies two allegedly significant changes in the law. First, in 1994 the Virginia General Assembly excluded organizations holding tax-exempt status under § 501(c)(3) of the Internal Revenue Code from the definition of "political committees" under Va. Code § 24.2-901. Democratic Party Br. at 3-4. Second, the 1996 amendment to Va. Code § 24.2-1014(B), which requires that written material discussing candidates for elective office contain attribution statements, deleted the term "potential nominee or candidate" and replaced it with "clearly identified candidate." *Id.*

Both of these changes are irrelevant to the issues Petitioners have raised. Petitioners do not hold tax exempt status, and thus do not fall within this exception to Va. Code § 24.2-901. Further, Petitioners' voter guides describe the policy positions taken by clearly identified candidates, *i.e.*, the major parties' nominees for state-wide office. This amendment to Va. Code § 24.2-1014(B) thus does *nothing* to prevent the Democratic Party from once again enjoining Petitioners' distribution of voter guides.

B. The Court of Appeals Did Not Consider Whether the Statutory Recodification and Amendments Are Material.

Virginia and the Democratic Party both assert that the Court of Appeals held that the intervening statutory recodification and amendments materially changed the law. Democratic Party Br. at 4; Virginia Br. at 6. Contrary to these assertions, in holding that Petitioners' prior restraint challenge was mooted by the recodification and amendments, the Court of Appeals did not pause to consider or analyze whether these changes were material to Petitioners' challenge.

The Democratic Party cites the Court of Appeals' statement that "the statutes which the [Petitioners] challenged are no longer the statutes in effect in Virginia." Democratic Party Br. at 4 (*quoting* Pet. App. at 40, 122 F.3d at 197-98). This statement merely acknowledges that the relevant election laws have been repealed and recodified. It contains no analysis suggesting that the recodification was *material* to this case.

Virginia claims that "the Fourth Circuit also recognized that Virginia's General Assembly had amended the challenged provisions 'to narrow their reach.'" Virginia Br. at 6 n.4. In this passage, the District Court (not the Court of Appeals) merely acknowledges what is undisputed, namely, that in 1996 the Virginia General Assembly narrowed Virginia election law as it applies to speech concerning election *referenda*. *See* Pet. at 9-10. None of the 1996 amendments, however, narrowed the law as it applies to speech concerning *candidate* elections. It is this type of core political speech that has been the subject of the underlying enforcement actions, and it is this type of speech that the challenged statutes "chill and deter." First Amended Complaint ¶ 39.

C. In the *VSHL* Companion Case, the Court of Appeals Recently Confirmed that the Statutory Amendments Are Not Material, And that the Statutes May Still Be Employed to Silence Speech.

In the *VSHL* companion case, a different panel[1] of the Court of Appeals very recently confirmed that the statutory recodification and amendments are not material. On December 19, 1997, the *VSHL* panel ruled that with respect to the VCFDA's regulation of speech concerning *candidate* elections, the 1996 amendments are *"irrelevant."*[2] Supp. App. at 14 (emphasis added). The *VSHL* panel further ruled that the VCFDA and its injunction enforcement mechanism still remain available to suppress speech in candidate elections. Supp. App. at 3 n.1.

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[1] The Court of Appeals panel in this case consisted of Circuit Judges Widener, Murnaghan and Phillips. The *VSHL* panel consisted of Circuit Judges Murnaghan and Wilkins and District Judge Herlong. Judge Murnaghan authored both decisions.

[2] The *VSHL* panel raised and dismissed the possibility that the 1996 deletion of Va. Code § 24.2-910(B)(3) (which had required a person or political committee to report funds spent in promoting or opposing referendum questions) was material to candidate election speech. Supp. App. at 14-15. The deletion of Va. Code § 24.2-910(B)(3) plainly represents no material change in the law with respect to *candidate* election speech. The only effect of this section's deletion is that persons who do not receive contributions now are not required to report their expenditures concerning election *referenda*. All expenditures (regardless of whether by "political committees" or by persons) in *candidate* elections must still reported. *See* Va. Code § 24.2-910(A) (political committees); Va. Code § 24.2-910(B) (persons).

II. PETITIONERS' FIRST AMENDMENT CHALLENGE IS JUSTICIABLE.

A. The *VSHL* Panel's Justiciability Ruling Conflicts with the Justiciability Ruling of the Court Below.

The *VSHL* panel ruled that the *VSHL* plaintiffs' First Amendment challenge to the VCFDA is justiciable because the VCFDA's "plain terms" apply to the *VSHL* plaintiffs' speech, and because there is a threat of private parties "suing to enjoin VSHL's distribution of campaign literature based on the statutes." Supp. App. at 3 n.1.[3] Like Petitioners here, the *VSHL* plaintiffs engage in issue advocacy in Virginia candidate elections. Unlike Petitioners here, however, the *VSHL* plaintiffs have never before been enjoined under the VCFDA. On the question of justiciability, then, the Court of Appeals' holdings in this case and in *VSHL* are incongruous.

Justiciability does not turn on whether a challenge to a statute is facial or as applied, notwithstanding the Court of Appeals' holding, *see* Pet. App. 40-43, 122 F.3d at 198-99, or Virginia's suggestion. *See* Virginia Br. at 4.

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[3] Rather than reaching the merits, however, the *VSHL* panel certified to the Supreme Court of Virginia the question of whether the VCFDA applies to "issue advocacy" speech in candidate elections. Supp. App. at 3. The *VSHL* panel did so notwithstanding (1) that the Virginia Supreme Court previously rejected a similar certified question from the District Court in *VSHL*, *see id.* at 2; (2) its own conclusion that the VCFDA is not "readily susceptible" of the narrow, saving construction given to it by the District Court, *see id.* at 3, 7; and (3) this Court's holding in *City of Houston v. Hill*, 482 U.S. 451, 471, 107 S. Ct. 2502, 2514-15 (1987), that certification in these circumstances is thus not appropriate.

Indeed, in *Steffell v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974), this Court rejected exactly this distinction and instead held that the relevant inquiry is whether there is a "genuine threat of enforcement of a disputed state . . . statute, [regardless of] whether an attack is made on the constitutionality of the statute *on its face or as applied.*" *Id.* at 475, 94 S. Ct. at 1223-24 (emphasis added). The same threat of enforcement identified by the *VSHL* panel that creates a justiciable controversy there creates a justiciable controversy *here*, regardless of whether Petitioners' prior restraint challenge is deemed facial or as applied.[4]

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[4] The facial/as applied distinction is relevant not to *justiciability*, but rather to the scope of the *remedy*, *i.e.*, whether a challenged statute is unconstitutional against the challenger only or in every conceivable application. *See Steffell*, 415 U.S. at 474, 94 S. Ct. at 1223. Even if this distinction were relevant, Petitioners facially challenge the VCFDA with its injunction enforcement mechanism because they allege that as an unconstitutional system of prior restraint, it is unconstitutional in all its applications. First Amended Complaint ¶ 67. *See Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-97, 104 S. Ct. 2118, 2124 (1984) (systems of prior restraint are unconstitutional not only as applied, but also "on their face because it [is] apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas"). The *VSHL* plaintiffs, in contrast, have asserted a facial *overbreadth* challenge to the VCFDA. *See id.* at 796, 104 S. Ct. at 2124 (distinguishing between two "quite different" bases for a facial challenge to a statute: "either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'").

B. The Enforcement Record Here Establishes a Credible Threat of Future Enforcement.

Neither Virginia nor the Democratic Party address this Court's cases that hold that *prior* enforcement of a statute establishes a "credible threat" of future enforcement, and thus a justiciable controversy concerning the statute. *See* Pet. at 16-17. Instead, both Virginia and the Democratic Party rely (as did the Court of Appeals, *see* Pet. App. 41) upon this Court's statement in *Renne v. Geary*, 501 U.S. 312, 111 S. Ct. 2331 (1991) that "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects.'" *Id.* at 320-21, 111 S. Ct. at 2338 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S. Ct. 669, 676 (1974)).

Preliminarily, Petitioners allege that there are "continuing, present adverse effects" resulting from the prior enforcement of the challenged statutes, namely, the chilling and deterrence of their speech in Virginia elections. First Amended Complaint ¶ 39. Furthermore, this Court explained in *O'Shea* that "past wrongs are evidence bearing on whether there is real and immediate threat of repeated injury." *Id.* Indeed, this Court noted that past wrongs take on particular significance with respect to *threatened* injury to the extent that they involve, as here, past enforcement of a statute that is alleged to be "unconstitutional on its face or as applied." *Id.* Thus, in *Renee*, this Court held that the complete *absence* of any prior enforcement actions against the plaintiffs under the challenged state constitutional provision showed that there was no "credible threat" of future enforcement. *See Renne*, 501 U.S. at 322, 111 S. Ct. at 2339. Because there was no

such threat, this Court held that the First Amendment challenge was not justiciable.[5] *Id.*

Here, the Democratic Party has expressly reserved its claimed prerogative to bring future enforcement actions under the VCFDA.[6] *See* Pet. at 18. While Virginia argues that the Virginia Supreme Court's dissolution of the most recent prior restraint is evidence of the unlikelihood of future enforcement actions, *see* Virginia Br. at 6 n.3, the Democratic Party views the Virginia Supreme Court's order as meaningless. *See* Democratic Party Br. at 6-7. In view of the past enforcement actions, as well as the Democratic Party's stated willingness to enforce the statute by injunction in the future, Petitioners have "an actual and well-founded fear that the law will be enforced against them." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393, 108 S. Ct. 636, 643 (1988).

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[5] The Court of Appeals' interpretation of *Renne*'s ripeness standard conflicts with the Tenth Circuit's, which reads *Renne*, as Petitioners do here, as turning on the absence of any "credible threat" that the challenged provision would be enforced against the *Renne* plaintiffs. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1501 n.1 (10th Cir. 1995).

[6] The Democratic Party notes that it did not seek to enforce the challenged statutes in Virginia elections in 1994, 1995, 1996, and 1997. Democratic Party Br. at 5 n.3. Virginia's 1994 and 1996 elections, however, were exclusively *federal* elections, and in such elections the Federal Election Campaign Act expressly preempts state campaign finance laws such as the VCFDA. *See* 2 U.S.C. § 453. With respect to the 1995 and 1997 elections, this action and *VSHL* were commenced on October 2, 1995, one month before the 1995 elections. Both sought injunctive relief, and the District Court in *VSHL* preliminarily enjoined Virginia's enforcement of the VCFDA.

III. THE DEMOCRATIC PARTY DOES NOT DEFEND THE COURT OF APPEALS' *ROOKER-FELDMAN* HOLDING.

The Democratic Party neither defends nor agrees with the Court of Appeals' broad holding that a federal court *never* has jurisdiction under *Rooker-Feldman* and *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994) to award damages arising out of state court injunctions, even if such injunctions have been overturned. Instead, after asserting without analysis that the Court of Appeals' *Rooker-Feldman* holding is not so broad, the Democratic Party argues that the *result* of this decision actually comports with *Heck* because the underlying injunctions were not overturned. Democratic Party Br. at 6, 7, 10.

The Court of Appeals here certainly understood that there had been a "dissolution of the state courts' injunctions." Pet. App. at 49, 122 F.3d at 201. *See also id.* at 53, 122 F.3d at 203 n.11 ("LaRock . . . *appealed* the 1993 Fairfax injunction to the Virginia Supreme Court, which summarily dissolved the state court injunction.") (emphasis added). More importantly, whether the injunctions were overturned in favor of Petitioners is, at most, a *merits* question that goes to whether Petitioners have stated a claim under § 1983.[7] For *Rooker-Feldman* jurisdictional

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[7] *Heck* holds that a claim for § 1983 damages arising out of a state court criminal judgment states a claim to the extent that the judgment has "been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87, 114 S. Ct. at 2372. The state courts' dissolution of the underlying injunctions here satisfies this standard. In 1993, the Virginia Supreme Court summarily dissolved the Fairfax Circuit Court injunction pursuant to Va. Code § 8.01-626. This statute provides for expedited appellate

purposes, the dispositive question here is whether the underlying state court injunctions are still *outstanding*:

> If the [state court] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. *Unless and until so reversed or modified*, it would be an effective and conclusive adjudication. Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to *reverse* or *modify* a judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S. Ct. 149, 150 (1923) (emphasis added, citations omitted). Once

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review of *interlocutory* injunctions, and Petitioners successfully employed this procedure in 1993 to overturn the Fairfax Circuit Court's injunction. *Omega Corp. v. Cobb*, 222 Va. 875, 292 S.E.2d 44 (1981), cited by the Democratic Party (Br. at 7), holds that this procedure is no substitute for an appeal when an injunction is entered in "a *final judgment*." *Id.* at 876, 292 S.E.2d at 44 (emphasis added). Because the injunction entered against Petitioners was *interlocutory*, and because it was dissolved by the Virginia Supreme Court, there was no final judgment enjoining Petitioners necessary to appeal. In 1994, in the wake of the Virginia Supreme Court's dissolution of the 1993 Fairfax injunction, the Fairfax Circuit Court dismissed the injunction that had been entered by that court in 1989. The City of Richmond Circuit Court's 1989 temporary injunction lapsed, and the action was thereafter dismissed for failure to prosecute. In each instance, the state courts overturned or invalidated the injunctions.

a state court injunction has been reversed or vacated in the state court system, it is no longer an "effective and conclusive adjudication," and there is nothing for a federal district court to "reverse or modify." *Id.* Thus, to the extent that a federal court may grant federal relief without *reversing* a state court order or judgment, *Rooker-Feldman* does not bar federal jurisdiction over the action. *Marks v. Stinson*, 19 F.3d 873, 886 n.11 (3d Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 901 (1995). Because the District Court here would not be called upon to reverse the underlying injunctions (none of which are still in effect), the District Court has original jurisdiction over Petitioners' damages claims.

IV. THE DEMOCRATIC PARTY DOES NOT DISPUTE THAT IT INITIATED THE UNDERLYING INJUNCTIONS *EX PARTE*.

The Democratic Party does not dispute that it initiated the underlying injunctions *ex parte*. Instead, it asserts that the post-issuance hearings afforded the Petitioners sufficient opportunities to object to the already issued injunctions. Democratic Party Br. at 11. In *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347 (1968), however, this Court specifically held that such *post-issuance* hearings do not cure the due process and First Amendment deficiencies inherent in *ex parte* restraints of speech. *Id.* at 184, 89 S. Ct. at 347. Additionally, the decision below conflicts with those of other circuits, which would permit Petitioners to seek § 1983 redress for the injury occasioned by these *ex parte* injunctions because there was no full and fair opportunity to contest their issuance at the outset of the state court proceedings. *See* Pet. at 30-31.

DATED: January 5, 1998

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1292

VIRGINIA SOCIETY FOR HUMAN LIFE, INCORPORATED; ANDREA SEXTON,
Plaintiffs-Appellants,

versus

DONALD S. CALDWELL, Attorney for the Commonwealth of Virginia for the City of Roanoke, in his official capacity and as a representative of the class of Attorneys for the Commonwealth of Virginia; PAMELA M. CLARK, in her official capacity as Chairman of the Virginia Board of Elections; GEORGE M. HAMPTON, SR., Dr., in his official capacity as vice-Chairman of the Virginia Board of Elections; M. BRUCE MEADOWS, in his official capacity as Secretary of the Virginia Board of Elections,
Defendants-Appellees.

ORDER OF CERTIFICATION
[Filed: December 19, 1997]

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

The case involves a proceeding pending before the United States Court of Appeals for the Fourth Circuit as to which there is no controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia. Accordingly, we request that the Supreme Court of Virginia exercise its certification jurisdiction pursuant to article VI, section 1 of the Virginia Constitution and Rule

5:42 of the Rules of the Supreme Court of Virginia and decide the certified question.

I. Nature of the Controversy

This case involves a challenge to Virginia's election laws, Va. Code Ann. §§ 24.2-901, -908, -910(B) & -1014(B) (Michie 1997). The Virginia Society for Human Life (VSHL), the plaintiff-appellant, is a nonprofit organization that purportedly engages only in issue advocacy, but does not expressly advocate the election or defeat of any candidate. VSHL and one of its members sued Virginia's Commonwealth's Attorneys, alleging that these laws chilled their constitutionally protected speech because they had been used to impose unconstitutional prior restraints on issue advocacy groups in the past, and seeking a declaration that the referred to provisions of the election law facially violate the First Amendment to the United States Constitution.

The district judge first certified to the Supreme Court of Virginia the question whether the laws could be saved by narrowly construing them, but the Court rejected the question. The district judge then himself narrowly construed the laws in such a manner that they did not apply to VSHL and dismissed the case for lack of standing. Because that ruling by the federal district court is not binding upon state courts, it does not protect VSHL from having the allegedly unconstitutional statutes applied against it in the future.[1] VSHL therefore brought this appeal.

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[1] This case presents a live controversy even though the district court found that the challenged statutes did not apply to VSHL. VSHL may still bring a facial challenge to the statutes, and they still chill protected speech, because the district court's finding that VSHL need not comply with the statutes is not binding on Virginia courts. A federal district court "lack[s] jurisdiction authoritatively to construe state legislation." *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971). As the Seventh Circuit has explained:

A federal court is without power to avoid a constitutional question by providing a narrowing construction of a state statute unless the statute is "readily susceptible" of such construction. It is not apparent to us that the election laws at issue are readily susceptible to a construction by which they do not apply to VSHL. Rather than simply reversing the district court's dismissal and remanding for an evaluation of the merits of VSHL's constitutional challenge, however, we believe that the Supreme Court of Virginia should be given another chance authoritatively to interpret its laws so as to cure any constitutional infirmity.

II. The Question of Law to be Answered

Whether Va. Code Ann. §§ 24.2-901, -908, -910 & -1014 apply to issue advocacy groups, or whether the use of the phrase "for the purpose of influencing the outcome of an election" and related phrases limits the application of those statutes to groups that expressly advocate the election or defeat of a particular candidate.

> [A]n important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative. If the district judge [reads the state's] statute so narrowly as to obviate all constitutional questions, it would still be possible for the state to prosecute people for violating the statute as broadly construed, because the enforcement of the statute would not have been enjoined.

Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990). In this case, the district judge's finding that the statutes at issue do not apply to VSHL does not prevent a private party from suing to enjoin VSHL's distribution of campaign literature based on the statutes, nor does it prevent the state from prosecuting VSHL for failing to comply with the statutes. Because the scope of the statutes' applicability has not authoritatively been narrowed, and by their plain terms they apply to VSHL, VSHL's speech is still chilled by the statutes.

III. Statement of Facts Relevant to the Question Certified

VSHL is a nonprofit organization that conducts issue advocacy by periodically preparing voter guides, which do not expressly advocate the election or defeat of any candidate but rather state the candidates' views on public issues.[2] *See Virginia Soc'y for Human Life, Inc. v. Caldwell,* 906 F. Supp. 1071, 1072 (W.D. Va. 1995). Election laws in Virginia require certain people or organizations who spend money "for the purpose of influencing the outcome of any election," Va. Code Ann. § 24.2-901 (Michie 1997), to file a statement of organization, Va. Code Ann. § 24.2-908 (Michie 1997), and report their expenditures, Va. Code Ann. § 24.2-910 (Michie 1997), and also require any writings made "for the purpose of influencing the outcome of an election for public office" to identify the author, Va. Code Ann. § 24.2-1014 (Michie 1997). Those statutes are probably unconstitutional under the Supreme Court's decisions in *Buckley v. Valeo,* 424 U.S. 1, 78-80 (1976) (per curiam) (interpreting federal election laws that require the disclosure of expenditures to apply only to expenditures used expressly to advocate the election or defeat of a clearly identified candidate, thereby avoiding the First Amendment problems that would arise from a reporting requirement that applied to funds expended in issue discussion), and *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995) (holding that an Ohio statute prohibiting anonymous issue advocacy was an unconstitutional abridgment of speech), if the statutes apply to issue advocacy groups like VSHL. VSHL asserts that predecessors to the current statutes have repeatedly been used on the eve of past elections to impose unconstitutional prior restraints on protected issue advocacy.

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[2] We have assumed for purposes of this appeal that VSHL conducts only issue advocacy, as they asserted in their pleadings.

VSHL challenged the constitutionality of the statutes and sought an injunction barring their enforcement. The district court recognized that the plain language of the statutes suggests that they apply to issue advocacy groups such as VSHL. *See Virginia Soc'y for Human Life, Inc.*, 906 F. Supp. at 1074-76. Because there is little Virginia case law interpreting the statutes, the court certified to the Supreme Court of Virginia the question whether they were susceptible to a narrowing construction that would save their constitutionality. *See* J.A. at 106 (Order of Certification to the Supreme Court of Virginia).

The Supreme Court of Virginia "rejected" the certified questions without explanation on January 18, 1996. About four months later, the Virginia General Assembly amended the statutes (the parties contest the materiality of the amendments). To save their constitutionality, the district court narrowly construed the new provisions based on the Supreme Court's interpretation of the *federal* election laws in *Buckley,* 424 U.S. at 79-80 (1976). The district court found that the phrase "for the purpose of influencing" in the Virginia statutes was "a term of art whose well-established meaning excludes issue advocacy." J.A. at 309 (Memorandum Opinion of Feb. 19, 1997). Because VSHL conducts only issue advocacy and not express candidate advocacy, the district court dismissed VSHL's claim for lack of standing. *See id.* at 312. VSHL brought this appeal.

IV. Names of the Parties

Plaintiffs - Appellants:

Virginia Society for Human Life, Inc.
Andrea Sexton

Defendants - Appellees:

Donald S. Caldwell, Attorney for the Commonwealth of Virginia for the City of Roanoke, in his official capacity and

as a representative of the class of Attorneys for the Commonwealth of Virginia.

Pamela M. Clark, in her official capacity as Chairman of the Virginia Board of Elections.

Dr. George M. Hampton, Sr., in his official capacity as Vice-Chairman of the Virginia Board of Elections.

M. Bruce Meadows, in his official capacity as a Secretary of the Virginia Board of Elections.

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VI. The Certified Question is Determinative of the Proceeding in this Court

As discussed above, the district court narrowly construed the contested election laws based on the Supreme Court's interpretation of the federal election laws in *Buckley v. Valeo,* 424 U.S. 1, 79-80 (1976) (per curiam). The district court found that the phrase "for the purpose of influencing"

in the Virginia statutes was "a term of art whose well-established meaning excludes issue advocacy." J.A. at 309 (Memorandum Opinion of Feb. 9, 1997). It did so because it believed that where a "statute [is] reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that a [sic] construction which will save the statute from constitutional infirmity." *Id.* at 310 (quoting *United States ex rel. Attorney General of the United States v. Delaware and Hudson Co.*, 213 U.S. 366, 407 (1909) (regarding a federal statute)) (internal quotation marks omitted).

Federal courts have the power and the duty to adopt narrowing constructions of federal statutes to avoid constitutional difficulties "if such a construction is fairly possible," but "federal courts are without power to adopt a narrowing construction of a *state* statute unless such a construction is reasonable and readily apparent." *Boos v. Barry*, 485 U.S. 312, 330-31 (1988) (emphasis added). We are not convinced that the narrow construction of Virginia's election laws was "readily apparent." In fact, a *de novo* review of the text, structure and history of the election laws at issue suggests to us that they do apply to issue advocacy groups such as VSHL.

A straightforward reading of the text supports VSHL's claims that its issue advocacy is encompassed within "expenditures for the purpose of influencing the outcome of any election." Va. Code Ann. § 24.2-901 (Michie 1997). *Black's Law Dictionary* defines "influence" as "[t]o affect, modify or act upon by physical, mental or moral power, especially in some gentle, subtle, and gradual way," *id.* at 779 (6th ed. 1990). *Webster's* defines "influence" as "to affect or alter the conduct, thought, or character of by indirect or intangible means." *Webster's Third New International Dictionary* 1160 (1993). Under either definition, the voter guides published by VSHL setting out candidates' positions

on public issues such as abortion are clearly intended to influence the outcome of an election.

Furthermore, section 901(B) specifically excludes from the definition of "political committee"[3] those organizations that do not engage in express candidate advocacy *if* they are also tax-exempt under 26 U.S.C. § 501(c)(3).[4] The most logical reading of this provision is that an organization that does not engage in express advocacy but is *not* tax-exempt under § 501(c)*(3) is* included as a "political committee." *Expressio unius est exclusio alterius.* VSHL does not engage in express advocacy, but is tax exempt under 26 U.S.C. § 501(c)*(4),* not § 501(c)*(3), see* J.A. at 120 (Amended Verified Complaint of July 12, 1996), and thus is included in the definition of "political committee."

The district court asserted that the Virginia General Assembly "presumably was aware of *Buckley*'s construction of the phrase 'for the purpose of influencing' to include only express candidate advocacy" when it enacted and amended sections 24.2-901 to -1014 . J.A. at 310 (Memorandum Opinion of Feb. 19, 1997). However, it is extremely unlikely that the General Assembly, after reading *Buckley* and learning that the term "for the purpose of influencing" was unconstitutionally vague and required a narrowing construction to save it, would then decide to use that term, without explanation, in its statute. If the General Assembly meant to define "political committee" as an organization which expended funds "for express candidate advocacy" only, it would have said so explicitly.

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[3] And from the definitions of "political action committee" and "person" as well.

[4] The exclusion is only for the purpose of certain sections of the chapter, including sections 24.2-908 & 910.

The language of section 24.2-910, in conjunction with the definition of "expenditure" in section 24.2-901, provides further evidence that the Virginia election code is intended to regulate issue advocacy groups. Section 24.2-910(B) requires any person who makes independent expenditures of a minimum amount to maintain records and report those expenditures. The expenditures to be reported explicitly include *not only* "funds expended for the purpose of influencing the outcome of any election for public office," Va. Code Ann. § 24.2-910(B)(1) (Michie 1997), but also funds expended to publish "any material referring to a candidate by name, description, or other reference and (I) advocating his election or defeat, (ii) setting forth his position on any public issue, voting record, or other official acts, or (iii) otherwise designed to influence individuals to cast their votes for or against him." Va. Code Ann. § 24.2-910(B)(2) (Michie 1997). This subsection was obviously intended to refer not only to express candidate advocacy, but also to materials which simply describe a candidate's voting record in the hopes of influencing people's votes, that is, issue discussion.

A look at the recent amendments to section 24.2-910 confirms the unlikelihood of the district court's interpretation. When this case was originally filed, the statute required "any person or political committee making independent expenditures" to "maintain records and report . . . expenditures made of: . . . 3. Any funds in any amount expended to publish or broadcast to the public any material promoting or opposing a question submitted to the voters in a referendum." Va. Code Ann. § 24.2-910 (Michie 1995); *see also* 1996 Va. Acts ch. 1042 (reproduced in J.A. at 149-50). The district court held that the Virginia General Assembly intended the phrase "for the purpose of influencing the outcome of an election" in the definition of "expenditure" to mean only "expenditures for express candidate

advocacy." J.A. at 311 (Memorandum Opinion of Feb. 19, 1997). If this were correct, then the pre-amendment section 24.2-910(B)(3) would mean that a person must report funds spent for express candidate advocacy regarding questions submitted to the voters in a referendum. The statute is simply not readily susceptible of this interpretation.

As with the definition of "political committee," if the General Assembly had meant to require reporting only of funds expended on materials that expressly advocated the election or defeat of a candidate, it would have said so explicitly. In fact it said just that in subsection 24.2-910(B)(2)(I) — and then went on in subsections (ii) and (iii) to require the reporting of funds spent on other materials. It appears to us that the Assembly meant to regulate those other materials as well.

Of course the Supreme Court of Virginia may impose a narrowing construction upon these statutes if it determines that such a construction would be correct. If it chooses to do so, we will then evaluate the constitutionality of the statutes as the Supreme Court of Virginia has authoritatively construed them. We may then either dismiss the case for lack of standing or strike the statute because it is unconstitutional, as appropriate. But should the Supreme Court of Virginia decline to narrow the statutes, we will not adopt a narrowing construction but will instead evaluate their constitutionality in light of *Buckley* and *McIntyre*.

VII. Relevant Decisions of the Supreme Court and Court of Appeals of Virginia, and Why These Decisions are not Controlling

A. Virginia Circuit Court Cases Suggest That the Statutes Apply to Issue Advocacy

No Virginia appellate court has interpreted the statutes at issue. The statutes have been applied by Virginia trial

courts,[5] and these opinions suggest that the statute does apply to issue advocacy groups. *See Democratic Party of Virginia v. The Family Foundation,* No. 132062 (Fairfax County Cir. Ct. Oct. 27, 1993), *injunction dissolved,* No. [no number] (Va. Nov. 1, 1993); *Democratic Party of Virginia v. Committee for Providing Truth in Political Candidate Positions,* No. 113693 (Fairfax County Cir. Ct. Nov. 6, 1989); *Roberts v. Virginia Leadership Council,* No. N-8489-4 (Richmond Cir. Ct. Nov. 4, 1989); *see also* J.A. at 22-25, 43-73 (Verified Complaint of Oct. 2, 1995) (citing and appending trial court opinions).

These trial court decisions were based on previous versions of the since-amended law. *See* J.A. at 109 (Order of Certification to the Supreme Court of Virginia) ("On several occasions, state circuit courts have not only broadly construed similar provisions of the predecessor to Virginia's Campaign Finance Disclosure Act, the Fair Election Practice Act, Va. Code Ann. §§ 24.1-252 to 24.1-263.1 (repealed 1993), but also have relied on those similarly worded provisions to impose unconstitutional prior restraints."). Despite VSHL's repeated assertions that the old "statutory language . . . is identical in all substantive respects to the provisions at issue here," Brief of Appellants at 9-10, we are uncertain whether intervening amendments and advisory opinions of the Virginia Attorney General might not influence Virginia courts to interpret the modern statutes differently, *see* Brief of Appellees at 5 & n.4. Furthermore, the

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[5] In *City of Houston v. Hill,* 482 U.S. 451 (1987), the Supreme Court invalidated a state law based on the interpretation given it by city municipal courts, even though the state appellate courts had never had an opportunity to construe it, *see id.* at 469-70. "[T]rial court interpretations," the Supreme Court recognized, "constitute 'a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance.' " *Id.* at 470. (quoting *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949)).

most recent prior restraint (in 1993) was dissolved without opinion by the Supreme Court of Virginia. *See* J.A. at 73 (Order of Nov. 1, 1993). In sum, the Virginia case law is not clear in interpreting the statutes at issue.

B. Statements of State Officials Are Not Dispositive

Although the district court did not explicitly rely on any statements of state officials in construing the laws at issue, both parties point to statements that they believe apply. VSHL notes that the Secretary of the State Board of Elections in 1989 attested that a predecessor to section 24.2-908 applied to organizations engaged in issue advocacy. *See* J.A. at 47-49 (affidavit). The Commonwealth's Attorneys point to the 1995 Report of the Attorney General of Virginia in which he opined that the parts of Va. Code Ann. § 24.2-1014 (Michie 1995) (since amended) would not survive constitutional challenge in light of *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), although the remainder of the statute could in his opinion be interpreted to be consistent with both *McIntyre* and *Buckley v. Valeo*.[6] *See* 1995 Op. Va. Att'y Gen. 170, 172-77.

It is unclear how much weight, if any, we should give to these interpretations. The Supreme Court has relied upon the interpretation given to a law by those charged with its en-

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[6] To the extent that section 24.2-1014 prohibited anonymous writings concerning referenda, the Attorney General opined that it was unconstitutional. *See* 1995 Op. Va. Att'y Gen. 170, 172. However, he believed that the remainder of section 24.2-1014 could be interpreted only to prohibit anonymous express candidate advocacy, and thus would be constitutional. *See id.* at 175-76. This opinion discussed only section 24.2-1014, not sections 24.2-901, -908, or -910. Furthermore the version of section 24.2-1014 discussed therein did not contain the language "for the purpose of influencing" added by the 1996 amendment, although the Attorney General referred to that phrase and the Supreme Court's narrowing construction of it in his discussion of *Buckley*. 1995 Op. Va. Att'y Gen. 170, 175-76.

forcement when evaluating the law's constitutionality. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court's finding that a municipal ordinance was "readily subject to a narrowing construction that avoids constitutional difficulties," *id.* at 482, was "supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view" of the scope of the ordinance's prohibition, *id.* at 483.

The State Board of Elections is not charged with criminal enforcement of the election laws, *see* Va. Code Ann. §§ 24.2-104 & -1019 (Michie 1997), although it may petition a Virginia court for a writ of mandamus or prohibition to ensure that elections are conducted in accordance with the election law, *see* Va. Code Ann. § 24.2-103 (Michie 1997), or may request that the Attorney General investigate an infraction, *see* Va. Code Ann. § 24.2-104 (Michie 1997). Because the affidavit upon which the appellants rely is simply the opinion of one past secretary of the Board, is not an official proclamation, and in any case simply reiterates that the laws are to be enforced as their plain language suggests they are to be enforced, our opinion is not greatly affected by the affidavit. *See* J.A. at 47-49 (affidavit).

The Attorney General of Virginia does have enforcement authority regarding the election laws, if requested by the State Board of Elections or the Commonwealth's Attorney. *See* Va. Code Ann. §§ 24.2-104 & 2.1-124(A) (Michie 1997). The Supreme Court of Virginia has indicated that although the construction given to a statute by the Attorney General "is of course not binding" on it, it "is entitled to due consideration." *Board of Supervisors of Albemarle County v. Marshall,* 215 Va. 756, 762, 214 S.E.2d 146, 150 (Va. 1975). However, the United States Supreme Court has noted that as Virginia's "Attorney General does not bind the state courts or local law enforcement authorities, we are unable to accept her interpretation of the law as authorita-

tive." *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 395 (1988). In sum, the Attorney General's opinion may be helpful but is not dispositive.

C. Recent Amendments to the Statute Appear to Respond to The Attorney General's Concerns about McIntyre

After the Attorney General issued his opinion, the General Assembly amended the statutes at issue. *See* 1996 Va. Acts ch. 1042. Although most of the 1996 amendments are irrelevant to the issues in this case, certain amendments suggest that the General Assembly was familiar with the Supreme Court's recent holding in *McIntyre*, invalidating a prohibition on anonymous leaflets regarding a referendum. For example, section 24.2-1014, which prohibits anonymous campaign writing, was amended to add the language "made for the purpose of influencing the outcome of an election for public office" to the definition of "writing." 1996 Va. Acts ch. 1042. Furthermore, the type of writings covered in section 24.2-1014(B) was amended to remove the phrase "or concerning any question to be submitted to the voters." *Id.* This was the phrase that the Attorney General in his opinion suggested would not stand up to constitutional challenge because it prohibited anonymous leafleting regarding referenda. Other changes to this section similarly seem to respond to concerns about *McIntyre*.

However, one part of the amendments is not necessarily a response to *McIntyre*, but may have been an effort to conform the statute to the requirements of *Buckley*. Section 24.2-910(B)(3), which previously had required a person (or political committee) to report funds spent in promoting or opposing referendum questions, was deleted. It is possible that this 1996 deletion reflected the General Assembly's new understanding, 20 years after *Buckley v. Valeo,* that reporting requirements might be unconstitutional when applied to speech that did not expressly advocate the election or defeat

of a particular candidate. However, it is more likely that the deletion was just another response to *McIntyre*'s affirmation of the importance of anonymous referendum leafleting — for one cannot be anonymous if one is required to maintain records of and report all supposedly "anonymous" expenditures.

In light of the Attorney General's opinion and the subsequent amendments, perhaps we would find that the statutes are readily susceptible of an interpretation consistent with *McIntyre*, but neither document leads us to believe that we would be justified in narrowing the statute to comport with *Buckley*.

Because no published decision of the Courts of the Commonwealth of Virginia resolves the issues presented here, we certify this question to the Supreme Court of Virginia.

/s/ Francis D. Murnaghan, Jr.
Francis D. Murnaghan, Jr.
Presiding Judge

[OFFICIAL FOURTH CIRCUIT SEAL]

A True Copy, Teste:
Patricia S. Connor, Clerk
BY /s/ Sandra Taylor
Deputy Clerk